

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





1315  
75-1321

To be argued by:  
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

ADOLPHO RIVERA,

Appellant.

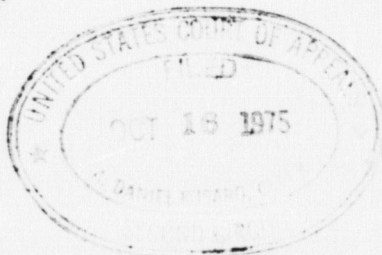
Docket No. 75-1321

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APPENDIX TO APPELLANT'S BRIEF

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ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,  
THE LEGAL AID SOCIETY,  
Attorney for Appellant  
ADOLPHO RIVERA  
FEDERAL DEFENDER SERVICES UNIT  
509 United States Court House  
Foley Square  
New York, New York 10007  
(212) 732-2971

JONATHAN J. SILBERMANN,  
Of Counsel.

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75 CRIM. 44

-over-

DATE	PROCEEDINGS
1-28-75	Trial continued. Court grants deft's. motion for a judgment of acquittal as to counts 1 and 6. Summations & charge. Jury finds the deft. guilty on each of counts 2,3,4 & 5. Sentence Mar.7,1975, 2:30 P.M. Pre-sentence investigation ordered. Deft. remanded in lieu of bail \$25,000 cash or surety previously fixed on indictment 74 Cr. 1013.....Wyatt,J.
2-5-75	RAFAEL FONTANEZ-Filed Order that deft. having been found mentally incompetent to stand trial, pursuant to 18:4246 he is committed to the custody of the Attorney General for observation & examination to determine whether the deft. is mentally competent to understand the nature of the charges against him & to aid in his own defense and the likelihood of the deft's. becoming competent in the foreseeable future. The Attorney General is to report to the Court within 90 days setting forth its findings and opinion with respect to the deft's. mental competency.....Wyatt,J. Sent 2 Certified Copies to the Marshals 3-5-75
3-10-75	ADOLPHO RIVERA-Filed CJA Form 23, deft's. financial affidavit.
3-7-75	ADOLPHO RIVERA - Filed Judgment & Commitment. (Atty. Present) The Deft. is hereby committed to the custody of the Atty. Gen. or his authorized representative for imprisonment for a period of (Cts. 2 & 3 are one offense) Twenty Five (25) Years, on count 3, but so much of the sentence of imprisonment as exceeds Fifteen (15) Years, is suspended & deft. is placed on probation for a period of One (1) Day. (Cts. 4 & 5 are one offense) Ten (10) Years, on count 5, to run concurrently with the sentence imposed on count 3. Wyatt J. Commitment issued 3-11-75
3-11-75	ADOLPHO RIVERA-Filed deft's. notice of appeal from the Judgment of 3-7-75, with MEMO ENDORSED. Deft's. application to proceed on appeal in forma pauperis is granted. SO ORDERED.....Wyatt,J. Mailed notice to Enid K. Gerley, 60 East 8th Street, N.Y.C. & U.S. Attorney's Office.
3-24-75	ADOLPHO RIVERA-Filed commitment & entered return. Deft. delivered to Warden, Federal Detention Headquarters, N.Y.C. on 3-7-75.
3-26-75	ADOLPHO RIVERA- Filed notice of certification & transmittal of the record on Appeal to the U.S.C.A.
Mar 31-75	Filed transcript of record of proceedings dated January 27, 28, 1975.
3-31-75	ADOLPHO RIVERA-Filed notice of certification & transmittal of the record on appeal to the U.S.C.A.
4-14-75	Filed transcript of record of proceedings dated 3-7-75.
4-14-75	ADOLPHO RIVERA-Filed notice of certification & transmittal of the supplemental record on appeal to the U.S.C.A.
3-5-75	ADOLPHO RIVERA-Filed true copy of U.S.C.A. mandate with Opinion attached. The judgment of the District Court is affirmed in part and reversed in part and the action is hereby remanded to the District Court for further proceedings in accordance with the opinion of this court. Judgment Entered 3-5-75...Clerk. (mailed notice)

Cont'd. on Page #3



TMF:lq  
74-3316  
n-708

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

RAFAEL FONTANEZ, a/k/a "Lefty," and  
ADOLPHO RIVERA,

Defendants.

INDICTMENT

S 74 Cr.

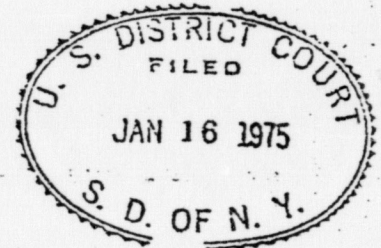
75 CRIM. 44

COUNT ONE

Conspiracy to Murder

The Grand Jury charges:

1. From on or about the 1st day of October, 1974 and continuously thereafter up to and including the 18th day of October, 1974, in the Southern District of New York, RAFAEL FONTANEZ, a/k/a "Lefty", and ADOLPHO RIVERA, the defendants, and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Section 1114 of Title 18, United States Code.



B

2. It was part of said conspiracy that said defendants unlawfully, intentionally and knowingly would murder and willfully, deliberately, maliciously and with premeditation kill Jerry Castillo, a Special Agent of and an officer and employee of the United States Department of Justice, Drug Enforcement Administration, while Jerry Castillo was engaged in and on account of the performance of his official duties, in violation of Section 1114 of Title 18, United States Code.

3. It was a further part of said conspiracy that said defendants unlawfully, intentionally and knowingly would commit the murder set forth in paragraph two (2) hereof in

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the perpetration of, and in the attempt to perpetrate, a robbery, to wit, the robbery set forth in Counts Two (2) and Three (3) of this Indictment.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York, and elsewhere:

1. On October 17, 1974, the defendant RAFAEL FONTANEZ told Jerry Castillo and another that he could deliver one-half pound of heroin.

2. On or about October 18, 1974, the defendant RAFAEL FONTANEZ met Jerry Castillo in the vicinity of 163rd Street and the Grand Concourse, Bronx, New York.

3. On or about October 18, 1974, the defendant RAFAEL FONTANEZ and Jerry Castillo drove to the vicinity of 196th Street and Colonial Avenue, New York, New York.

4. On or about October 18, 1974, the defendant RAFAEL FONTANEZ met the defendant ADOLPHO RIVERA in the vicinity of 196th Street and Colonial Avenue, New York City.

5. On or about October 18, 1974, in the vicinity of 196th Street and Colonial Avenue, New York, New York, the defendant RAFAEL FONTANEZ possessed a loaded .38 caliber revolver.

6. On or about October 18, 1974, in the vicinity of 196th Street and Colonial Avenue, New York, New York, the defendant ADOLPHO RIVERA possessed a pair of handcuffs.

7. On or about October 18, 1974, in the vicinity of 196th Street and Colonial Avenue, New York, New York, defendant ADOLPHO RIVERA held Jerry Castillo's hands behind his back while the defendant RAFAEL FONTANEZ pointed the loaded .38 caliber revolver at Jerry Castillo.

(Title 18, United States Code, Sections 1117, 1114, 1111.)



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COUNT TWO

Robbery of Money of  
the United States

The Grand Jury further charges:

On or about the 18th day of October, 1974, in the Southern District of New York, RAFAEL FONTANEZ, and ADOLPHO RIVERA, the defendants, unlawfully, wilfully and knowingly did assault Jerry Castillo, a person having lawful charge, control and custody of money and property of the United States, to wit, fourteen thousand dollars (\$14,000) of official Advance Funds, with intent to rob, steal and purloin such money and property of the United States.

(Title 18, United States Code, Section 2114  
and Section 2.)

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COUNT THREE

Use of a Dangerous Weapon

The Grand Jury further charges:

On or about the 18th day of October, 1974, in the Southern District of New York, RAFAEL FONTANEZ, and ADOLPHO RIVERA, the defendants, in effecting and attempting to effect the robbery charged in Count Two of this Indictment, unlawfully, wilfully and knowingly did put in jeopardy the life of Jerry Castillo by use of a dangerous weapon, to wit, a thirty-eight caliber revolver.

(Title 18, United States Code, Section 2114  
and Section 2.)





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COUNT FOUR

Assault on a Federal Officer  
and Employee

The Grand Jury further charges:

On or about 18th of October, 1974, in the Southern District of New York, RAFAEL FONTANEZ and ADOLPHO RIVERA, the defendants, unlawfully, wilfully and knowingly, did forcibly assault, resist, oppose, impede, intimidate and interfere with Jerry Castillo, an officer and employee of the Drug Enforcement Administration, while Jerry Castillo was engaged in and on account of the performance of his official duties.

(Title 18, United States Code, Sections  
111, 1114 and Section 2.)

COUNT FIVE

Use of a Deadly and Dangerous  
Weapon

The Grand Jury further charges:

On or about the 18th day of October, 1974, in the Southern District of New York, RAFAEL FONTANEZ and ADOLPHO RIVERA, the defendants, unlawfully, wilfully and knowingly, did, in the commission of the acts charged in Count Four of this Indictment, use a deadly and dangerous weapon.

(Title 18, United States Code, Sections  
111 and 2.)



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-703

COUNT SIX

Using and Carrying a Firearm  
During the Commission of a Felony

The Grand Jury further charges:

On or about the 18th day of October, 1974, in the Southern District of New York, RAFAEL FONTANEZ, and ADOLPHO RIVERA, the defendants, unlawfully, wilfully and knowingly did use a firearm to commit and did carry a firearm unlawfully during the commission of a felony for which each may be prosecuted in a court of the United States, to wit, the felonies charged in Counts One (1) of this Indictment.

(Title 18, United States Code, Section  
924(c)(1) and 924(c)(2) and 924(a).)

COUNT SEVEN

Receiving a Firearm While  
Under Indictment

The Grand Jury further charges:

On or about the 18th day of October, 1974, in the Southern District of New York, RAFAEL FONTANEZ, the defendant, who

1) was under indictment in the Supreme Court of the State of New York, Kings County, for a crime punishable by imprisonment for a term exceeding one year, to wit, possession of a dangerous weapon, a Class E felony; and

2) was under indictment in the New York State Special Narcotics Court for a crime punishable by imprisonment for a term exceeding one year, to wit, the criminal sale of dangerous drugs in violation of New York Penal Law Section 220.35, did unlawfully, wilfully and knowingly receive a firearm and ammunition, to wit, a loaded thirty-eight caliber fiveshot revolver, serial number Q055670, manufactured by R G Industries, which firearm and ammunition had been shipped and transported in interstate commerce.

(Title 18, United States Code, Section 922(h)(1) and 924(a).))

*Arnold Gault*  
Foreman

*Paul J. Curran*  
PAUL J. CURRAN  
United States Attorney

C7a



75 CRIM. 44

Form No. USA-330-274 (Ed. 9-25-58)

## United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

RAFAEL FONTANEZ, a/k/a "Lefty,"  
and ADOLFO RIVERA,

Defendants.

## INDICTMENT

S 74 Cr.

PAUL J. CURRAN

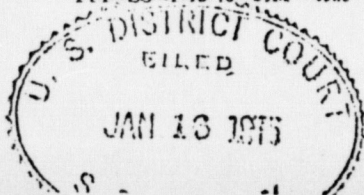
United States Attorney

A TRUE BILL

Armed Robbery

Foreman

FD-53-1-13-70-20M-4025



JAN 27 1975

JUDGE WYATT

d. Court directs the entry of a Not Guilty plea for both defendants (attys. present). Hearing held as to Deft. Rafael Fontanez. The Court finds that deft. Rafael Fontanez to be insane or otherwise incompetent to stand trial. The Court commits the deft. Rafael Fontanez to the custody of the atty. General, until he shall be mentally competent to stand trial. He is otherwise discharged according to law.

In Deft's motion to sever Rafael Fontanez at trial "Granted" Trial begun as to deft. Adolfo Rivera, with a jury. Both sides rest. Deft's motion for a judgment of acquittal as to counts 1 and 6. Decision Reserved.

JAN 28 1975 Trial cont'd. Court grants deft's motion for a judgment of acquittal as to counts 1 and 6.

Summons & Charge. Jury finds the deft. guilty on each of counts 2, 3, 4 & 5. Sentences Mar. 7, 1975, 2:30 P.M. Pre-Sent. Instruct. ordered. Deft. remanded in lieu of bail \$5,000. cash or surety previously fixed on indict. #74C.1013.

(over)

MAR 7 1975

(Reporter - Eugene Lewis - T. Fortuin, U.S.A. - (and Sterling Eng))

Sentence.

Def. Adolpho Rivera (att. present) (Counts 2 and 3 are not offered)

TWENTY-FIVE (25) YEARS, on count 3, but so much of the sentence of imprisonment as exceeds FIFTEEN (15) YEARS, is suspended and defendant is placed on probation for a period of ONE (1) DAY.

(Counts 4 and 5 are not offered)

TEN (10) YEARS, on count 5, to run concurrently with the sentence imposed on count 3.

D

W. J. H. J.

CLERK  
U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
E. J. Thompson



UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 1144—September Term, 1974.

(Argued June 24, 1975                      Decided July 14, 1975.)

Docket No. 75-1109

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UNITED STATES OF AMERICA,

*Appellee,*

—against—

ADOLPHO RIVERA, JR.,

*Appellant.*

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Before:

CLARK, *Associate Justice*,\*

MANSFIELD and MULLIGAN, *Circuit Judges*.

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Appeal from convictions of robbery of government property, 18 U.S.C. § 2114, and assault on a federal agent, 18 U.S.C. §§ 111 and 1114.

The robbery convictions are reversed and remanded for dismissal; the assault convictions are affirmed, but remanded for resentencing.

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THOMAS M. FORTUIN, Assistant United States Attorney (Paul J. Curran, United States Attorney, Southern District of New York, John D. Gordan, III, Asst. United States Attorney, of Counsel), *for Appellee*.

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\* United States Supreme Court, retired, sitting by designation.

JONATHAN J. SILBERMAN, New York, New York  
(William J. Gallagher, Legal Aid Society,  
New York, New York), *for Appellant.*

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MULLIGAN, *Circuit Judge:*

Adolpho Rivera, Jr., appeals from a judgment of conviction rendered on January 28, 1975 in the United States District Court for the Southern District of New York, Hon. Inzer B. Wyatt, *Judge*, after a two-day jury trial. Rivera was convicted on counts two through five of a seven-count indictment filed on January 16, 1975. These counts encompassed the following:

—Count Two charged Rivera and co-defendant Rafael Fontanez with assault of a government agent, one Jerry Castillo, with the intent to rob him of money belonging to the government, in violation of 18 U.S.C. § 2114;

—Count Three charged the same two defendants with putting Castillo's life in danger during the robbery described in Count Two by the use of a dangerous weapon (a revolver), in violation of 18 U.S.C. § 2114;

—Count Four charged the defendants with assault on a federal officer, in violation of 18 U.S.C. §§ 111 and 1114;

—Count Five charged the use of a dangerous weapon in the assault described in Count Four, in violation of 18 U.S.C. § 111.<sup>1</sup>

Rivera went to trial alone after co-defendant Fontanez was found mentally incompetent to stand trial. Although Rivera was convicted on Counts Two through Five, he was

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1. Count One of the indictment, charging Rivera and Fontanez with conspiracy to murder Agent Castillo, was dismissed during the trial after the close of the Government's case; similarly, Count Six, which charged the defendants with using a firearm during the commission of the felonies described in Count One, was also dismissed. Count Seven charged Fontanez only with receiving a firearm while under indictment, and is not here relevant.



sentenced on March 7, 1975 only on Three and Five, since Judge Wyatt held that Two and Four represented lesser included offenses. Rivera was given a sentence of twenty-five years' imprisonment on Count Three (fifteen years of which was to be served in a jail-type institution, with the rest suspended), and ten years' imprisonment on Count Five, this latter sentence to run concurrently with the sentence imposed on Count Three.

For reasons that will become apparent in this opinion, Rivera's convictions on Counts Two and Three must be reversed and remanded with instructions that they be dismissed. While the convictions on Four and Five are affirmed, they must be remanded for resentencing, since the original sentence on these counts may have been affected by the sentence on Count Three which is now set aside.

#### I. FACTS

At trial the government's chief witness was undercover agent Jerry Castillo of the Drug Enforcement Administration. He testified to negotiations with Fontanez for the purchase of a kilogram of heroin, which culminated in a meeting in the Bronx. When Fontanez insisted upon seeing Castillo's money, Castillo opened the trunk of his car which contained \$14,000 in one hundred dollar bills, supplied by the government for Castillo to make the "buy." Fontanez then drove Castillo's car on a wild and reckless ride through the Bronx, ultimately arriving at 196th Street and Colonial Avenue. There Fontanez parked the car and took the keys from the ignition, claiming that he had to show them to his connection to establish that he had the car which contained the money for the drug buy. Castillo objected and Fontanez relented and gave the keys back to Castillo. Fontanez returned approximately five minutes later with Rivera, now seen by Castillo for the

first time. Fontanez, holding a plain brown paper bag, approached the driver's side of the car, where Castillo was now sitting. When Castillo opened the car door, Fontanez pointed a loaded revolver at him and said, "Okay, move over and let my man [Rivera] in the back seat." Rivera jumped into the rear seat of the car. Fontanez then took the car keys out of the ignition and told Castillo he was going to kill him. Castillo pleaded with Fontanez not to do so, telling him he could have the money in the trunk. Fontanez then told Castillo to put his hands behind his back; when the latter complied, Rivera, without further instructions from Fontanez, grabbed Castillo's wrists and held his hands. Fontanez then asked Rivera if he should kill Castillo then and there; according to Castillo, Rivera did not respond to this question. Fontanez then told Rivera to handcuff Castillo, saying he would drive him elsewhere to shoot him. At this point Rivera let go of Castillo's wrists for a moment.

Fortunately for Castillo, these proceedings were under surveillance by other agents, who now moved in on his signal. Two of them, in apprehending Rivera, found a pair of Spanish-made handcuffs sticking out of the back of his trousers.

At trial Rivera testified on his own behalf. He claimed he was only visiting a friend's house when Fontanez walked in; this was, according to Rivera, the first time he had ever met Fontanez. Rivera merely asked Fontanez for a ride home. When they reached the car and Fontanez drew his revolver, Rivera said he grabbed Castillo only because he was scared. When Fontanez asked if he should kill Castillo, Rivera said he replied in the negative. Rivera also testified that he had never possessed or even seen the handcuffs the agents said they had found on his person; he further claimed he never knew Fontanez had a gun until he saw it pointed at Castillo.



## II. COUNTS TWO AND THREE

Rivera's convictions under 18 U.S.C. § 2114 cannot stand. While the language of that statute is couched in general terms,<sup>2</sup> it has been recently held in two cases in this circuit (both decided after the convictions entered here), that § 2114 is limited to offenses having a "postal nexus." *United States v. Reid*, slip op. 3073, 3077-79 (2d Cir., April 24, 1975) (opinion of Judge Friendly); *United States v. Rivera*, slip op. 2263, 2284-86 (2d Cir., March 13, 1975). There is no connection here with the Postal Service and the Government now concedes the inapplicability of § 2114. In a proper case it may be possible for the conviction to be affirmed in any event, since the defendant's action may fall instead under 18 U.S.C. § 2112,<sup>3</sup> the general robbery-of-government-property statute; in such a case it would be necessary to remand for resentencing under § 2112, but the conviction could still be affirmed even though the wrong statute was cited in the indictment. *United States v. Rivera*, *supra*, at 2287. However, that option is not available in the present case since it is clear that, on the facts established by the government, there was no "robbery" at all. This is so because there was no fulfillment of the venerable element of an "asportation," which is still essential for the crime of

2 "Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years."

3 "Whoever robs another of any kind or description of personal property belonging to the United States, shall be imprisoned not more than fifteen years."

robbery. E.g., *United States v. Reid*, *supra*, at 3095 ("To constitute robbery, there 'must be both a taking and a carrying away of the property.'" (citation omitted; emphasis in original)); *United States v. Nedley*, 255 F.2d 350 (3d Cir. 1958). The government does not claim, and could not since the money never left the trunk, that any asportation occurred but rather urges that none is necessary. However, the cases relied on by the government either concern the predecessor of § 2112, which defined two distinct offenses,<sup>4</sup> or merely deal with a defendant's obtaining constructive possession of property, rather than its asportation.<sup>5</sup>

<sup>4</sup> The old statute, formerly 18 U.S.C. § 99, read as follows: "Whoever shall rob another of any kind or description of personal property belonging to the United States, or shall feloniously take and carry away the same, shall be fined not more than \$5,000, or imprisoned not more than ten years, or both." (emphasis added). It has been held that, even assuming that carrying away is not an element of the first of the described offenses (which is analogous to the present § 2112), that offense still requires that the goods be "taken from the person of another and held by the robber for a perceptible interval of time." *Duffy v. Hudspeth*, 112 F.2d 559, 560 (10th Cir. 1940). Cf. *Rutkowski v. United States*, 149 F.2d 481, 483 (6th Cir. 1945) (taking a somewhat different view as to whether the older statute defined two separate offenses. In any case, the court still concluded that the crime of robbery includes at least some degree of asportation).

<sup>5</sup> Significantly, the constructive-possession cases cited by the Government do not involve the crimes of larceny or robbery, but rather such crimes as receiving a stolen car, or receiving or concealing narcotics. E.g., *United States v. Wolfenbarger*, 426 F.2d 992, 994-95 (6th Cir. 1970) (prosecution for receiving a stolen motor vehicle moving in interstate commerce); *United States v. Gitlitz*, 368 F.2d 501, 505 (2d Cir. 1966), cert. denied, 386 U.S. 1038 (1967) (prosecution for receipt, concealment and facilitation of transportation of marijuana); *United States v. Pardo-Bolland*, 348 F.2d 316, 323-24 (2d Cir.), cert. denied, 382 U.S. 944 (1965) (prosecution for receipt, concealment, sale, etc. of narcotics illegally imported into the United States). Robbery is a larceny from the person through force or the threat of force. Larceny has long since required that the property be asported or moved, see 4 W. Blackstone, Commentaries \*231.

We note that the proposed new Federal Criminal Code, introduced in Congress on January 15, 1975 as S.1, 94th Congress, 1st Session,



At best, then, there was an attempted robbery, but that does not fall within § 2112, which covers the completed and not the inchoate crime. Therefore, the convictions on Counts Two and Three must be reversed.

### III. COUNTS FOUR AND FIVE

Rivera fails to mount any serious attack on his convictions under Counts Four and Five of the indictment; we do not find it necessary to discuss his contentions here. However, though we affirm those convictions, we remand them for resentencing to insure that the original sentences on Four and Five were not affected by the twenty-five year sentence meted out on the now-reversed Count Three. See *United States v. Brown*, 479 F.2d 1170, 1173 (2d Cir. 1973); *McGee v. United States*, 462 F.2d 243, 246 (2d Cir. 1972).

The convictions on Counts Two and Three of the indictment are reversed and remanded so that they may be dismissed. The convictions on Counts Four and Five are affirmed, and are remanded solely for resentencing.

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defines theft broadly: "§ 1731 Theft—(a) Offense.—A person is guilty of an offense if he obtains or uses the property of another with [requisite] intent . . . ." Similarly, robbery occurs when a person "takes property of another from the person or presence of another by force and violence . . . ." (proposed § 1721). The working papers of the Commission set up to draft the new code indicate that the element of asportation would no longer be required to establish a theft or a robbery: ". . . all of the major forms of acquisitive behavior are meant to be covered, without inquiry into essentially irrelevant factors such as whether a caption or asportation has occurred, whether the defendant . . . had custody of the property, and the like." II Working Papers of the National Commission on Reform of Federal Criminal Laws 915 (1970). Since the code is merely a proposal not yet enacted into law, it is of course not controlling here. One wonders, however, how "caption" and "asportation" become essentially irrelevant in construing a statute which defines robbery in the traditional terms of taking property away from the person.

1 MD

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----x

5 United States of America

6 v.

75 Cr. 44

7 Adolpho Rivera

8 -----x

9  
10 August 29, 1975  
2:30 p.m.

11 BEFORE:

12 HON. INZER B. WYATT,

13 District Judge

14 APPEARANCES:

15 Paul J. Curran, Esq.,  
16 United States Attorney  
17 Thomas M. Fortuin, Esq.,  
Assistant United States Attorney

18 Murray Mogel, Esq. (Legal Aid)  
19 Attorney for Defendant

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21  
22 (Case called. Both sides ready.)  
23  
24  
25



1  
2 MR. MOGEL: Your Honor, in accordance with the  
3 Court of Appeals opinion of July 14th, I respectfully  
4 move that Counts 2 and 3 be dismissed.

5 THE COURT: The motion is granted.

6 I take it the government has no opposition.

7 MR. FORTUIN: We have no option, your Honor.

8 As you recall this case, your Honor previously  
9 sentenced the defendant to a maximum sentence of fifteen  
10 years.

11 THE COURT: I know it.

12 MR. FORTUIN: Now the maximum term your Honor  
13 could impose would be a term of ten years. Nothing has  
14 changed with respect to the defendant's background or the  
15 facts of the offense. Since your Honor imposed a sentence  
16 of fifteen years, which I thought was a fair sentence then,  
17 and I do now, I would urge the Court to impose the maximum  
18 term that you are empowered to impose.

19 THE COURT: I think that is ten years.

20 MR. FORTUIN: That is ten years; correct, your  
21 Honor.

22 THE COURT: Mr. Mogel, I have not considered before  
23 now anything additional to knowledge that I gained of the  
24 matter from the trial and the presentence report. I believe  
25 that you saw the presentence report before the sentence.

1 MR. MOGEL: Your Honor, I read the presentence  
2 report a few days ago. It is the report which was prepared  
3 in March.  
4

5 THE COURT: Yes.

6 MR. MOGEL: It hasn't been supplemented in any way.  
7 There have been certain changes in Mr. Rivera's situation.  
8 He was brought here today from a jail in the Bronx. The  
9 presentence report indicates that there were three outstand-  
10 ing bench warrants. Mr. Rivera petitioned to have those  
11 cases disposed of. He was taken to the Bronx, an attorney  
12 was assigned under Section 18 B of the County Law, and a  
13 sentence bargain has been entered into.

14 Mr. Rivera told me this morning that he had pleaded  
15 guilty to the three charges.

16 The conviction in this case constitutes a predicate  
17 felony. The minimum amount of time that Mr. Rivera will  
18 receive is from one and a half to three years consecutive  
19 to the sentence your Honor imposes. There is no provision  
20 under state law to make a state sentence concurrent with a  
21 federal sentence.

22 After he is released from his federal sentence he  
23 will be taken into the custody of the State of New York, and  
24 serve at least one and a half years, and possibly three.

25 At the time your Honor received the presentence



there was only an indication therein that there were three bench warrants outstanding.

There is another comment I would like to make regarding that presentence report. It was an extraordinarily meager report, and it was quite static, despite the fact that contained within the report was a signal that there was a rather profound psychological problem with Mr. Rivera.

There was an evaluation done when he was in the Army in the stockade which is quoted in part, and I read from that psychiatric report dated May 10, 1971:

"Explosive personality. Chronic moderateness is manifested by frequent outbursts of hostility. Poor judgment especially under stress. Strong sensitivity to separation and abandonment and poor self-esteem."

And that's the extent of the whole thing.

Your Honor, given the nature of the facts alleged as to the course of this crime, I would respectfully ask your Honor to consider having Mr. Rivera evaluated under the provisions of 4208 (b), and not sentencing him until there is a further evaluation which gives some insight into the dynamics of his personality and the possibility of any training or change.

As it stands now, he has been at Lewisburg for

1  
2 approximately eleven months. He has had no difficulty in  
3 Lewisburg. He has been working in industry there,  
4 particularly in the sewing factory, and he has not been  
5 placed in a program at Lewisburg because of the pendency  
6 of the appeal.

7 The information that Lewisburg has is merely the  
8 information which is contained in the presentence report,  
9 and I think in fairness to the defendant and to society  
10 there should be additional evaluation of Mr. Rivera.

11 THE COURT: I am not sympathetic, Mr. Mogel,  
12 with that suggestion. I think the nature of the offense  
13 precludes my adopting your suggestion.

14 I have gone over the file, particularly restudying  
15 the presentence report. I am more interested in your  
16 suggestion about the certainty of incarceration under the  
17 state court offense. When we were last here there were  
18 three charges pending, two in the Bronx state court and one in  
19 Manhattan. Now, are you saying on the two Bronx County  
20 offenses under the plea of guilty he faces the certainty of  
21 at least one and a half years consecutive sentences?

22 MR. MOGEL: That is what Mr. Rivera told me. And  
23 I think the third one, too; all three.

24 THE COURT: All three?

25 MR. MOGEL: Yes.



1 MD  
2 THE COURT: So then he faces --

3 MR. MOGEL: Wait a moment.

4 Excuse me, Judge. Your Honor, there were three  
5 charges. The possession of weapon charge is still open in  
6 Manhattan. It's the two charges on the bribery and the  
7 automobile.

8 THE COURT: How is the prospective sentence, or  
9 the offenses in Bronx County, related or connected, if at  
10 all, to the matter before me, the incident with Agent  
11 Kostikian?

12 MR. MOGEL: Your Honor, so far as I know they are  
13 not connected. All that is certain is that there will be a  
14 consecutive sentence result of those charges.

15 THE COURT: But in point of time --

16 MR. MOGEL: They occurred prior.

17 THE COURT: The state offenses occurred prior?

18 MR. MOGEL: Yes, your Honor.

19 THE COURT: Does the government see any effect of  
20 the consecutive sentence as far as this sentence is  
21 concerned? I don't immediately see it, but it certainly is  
22 a circumstance that has changed since I imposed sentence in  
23 March.

24 MR. FORTUIN: I don't see how it helps the  
25 defendant. It now indicates rather than having been

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2 convicted of one additional offense, which was the record  
3 last time, which was the assault on several Army officers,  
4 he has several other offenses relating to weapons he  
5 has been convicted of. Why that should help him in this  
6 proceeding, I don't know. Certainly the facts are not  
7 related to the facts in this case.

8 THE COURT: Well, he is twenty-four years old,  
9 and our hope always is that during the period of confinement  
10 the defendant can learn a trade or adjust himself to the  
11 demands of society in some way so that at a still fairly  
12 early age he can return to a satisfying and happy community  
13 life.

14 MR. FORTUIN: I think there is also an issue of  
15 protection of the public, though, your Honor. Here is a man  
16 who assaulted, as I recall, three or four of his superior  
17 commissioned officers when he was in the se-vice and spent  
18 two years in Leavenworth, and here's a man who engaged in what  
19 I believe was an attempt to murder a federal agent, and then  
20 at the same time he has now several weapons charges, I  
21 believe, pending in the state.

22 I think there is also a question of how many  
23 times --

24 THE COURT: No, he has only one weapons charge  
25 pending in the state.



I think there is also a question of how many times

THE COURT: No, he has only one weapons charge pending in the state.

MR. MOGEL: Yes., your Honor.

MR. FORTUIN: He has pleaded guilty, as I understand, to two charges.

MR. MOGEL: An automobile charge and a bribery charge.

THE COURT: He hasn't been sentenced, and I have to assume he will be given, according to Mr. Mogel's representation, at least one and a half years consecutively.

MR. FORTUIN: Then he has pleaded to another weapons charge. He has been convicted, in effect, on another weapons charge, which is at least three separate occasions in which he was involved in crimes involving violence over a relatively short period of time.

THE COURT: Mr. Mogel, wouldn't it be the maximum protection that I could afford, or the maximum possibility that I could afford, the defendant to make him eligible for parole in the discretion of the parole board?

MR. MOGEL: Is your Honor considering an A-2 sentence?

THE COURT: I was just thinking. I was just inviting your comments.

1  
2 MR. MOGEL: My comment is that an A-2 sentence  
3 is pretty much ignored by the Board of Parole, despite the  
4 recent Slutsky case. The Board of Parole has established  
5 guidelines based on the set standards regarding their  
6 decisions, the prime standard being severity of offense.  
7 Since this offense falls into the high severity category,  
8 frankly, whether an A-2 sentence were imposed or not I think  
9 that Mr. Rivera would be held in custody until he was  
10 required to be released under mandatory release, which would  
11 be approximately two-thirds of the sentence.

12 THE COURT: I am not sure, in any event, that this is  
13 an appropriate case for the A-2 treatment.

14 When will he be sentenced in state court on the  
15 state court charges?

16 MR. MOGEL: The 10th.

17 THE COURT: Of September?

18 MR. MOGEL: Yes, your Honor.

19 THE COURT: I think it is better to impose sentence  
20 now without regard to A-2, and after the state court  
21 sentence if the sentence actually imposed by the state court  
22 suggests to you that the sentence now to be imposed should  
23 be reduced, I will consider a motion to reduce sentence.

24 Mr. Rivera, is there anything that you would like to  
25 say on your own behalf, any information that you would like



to give me in connection with punishment?

MR. RIVERA: Yes, your Honor.

THE COURT: All right, I will hear you.

MR. RIVERA: I have been incarcerated now eleven months.

THE COURT: Yes.

MR. RIVERA: And I have had, you know, I am truly sorry for getting involved with Mr. Montanez, but it was not like I had knowledge of what was going on at the time.

THE COURT: You mean with Agent Castille?

MR. RIVERA: Right. Because I was going for a lift.

THE COURT: I know.

MR. RIVERA: And because I was asking for a lift I, you know, I first was convicted for fifteen years, and during the eleven months, you know, I have been doing a whole lot of thinking, and I feel that ten years is too much time for a person that, you know, didn't commit the crime that was imposed upon me because all I asked was for a lift. I had no knowledge of what was going on, and I feel that my past record has, you know -- okay, I don't have a good past record, but --

THE COURT: No, you don't have a good past record.

That's the difficulty.

MR. RIVERA: But when you are doing time you have a chance to think, and to my knowledge I mean ten years, you know, to be convicted for ten years that's no way to rehabilitate a person.

THE COURT: Well, I have reviewed the circumstances here in the light of the opinion of the Court of Appeals, and I have taken account of what's been told to me today, but it still remains true that the offense for which the jury found you guilty was a very serious one.

Now, I know you are telling me that you were innocent, but, Mr. Rivera, remember that in my position I have to take the verdict of the jury as establishing your guilt. I have to assume that. I can't ignore the verdict of the jury. I can't accept your statement in place of the jury verdict. On that assumption it is a very serious offense.

On my review for purposes of resentencing I have again gone over the matter, and so far as the conviction on the other counts 2 and 3 are concerned I can ignore the fact of conviction, but, on the other hand, the reversal of the Court of Appeals was not because the evidence was insufficient but because the statute didn't cover what according to the verdict of the jury was done, and, therefore, I think that



I am entitled to consider what the jury found was done by you and Fontanez. Therefore, I feel that the ten year sentence which was imposed is a proper sentence. Counts 2 and 3 of the indictment, as I said, by reason of the decision of the Court of Appeals, is dismissed. Counts 4 and 5 are one offense. On Count 5 the defendant is committed to the custody of the Attorney General for ten years.

Now, if you wish to appeal you have a right to appeal, and if you are unable to pay the cost of an appeal you have a right to apply for leave to appeal in forma pauperis -- that is, without prepayment of fees or expenses. And if you so request the Clerk of the Court will prepare and file forthwith a notice of appeal on your behalf.

MR. MOGEL: Your Honor, Mr. Rivera states he wishes to appeal.

THE COURT: All right. Mr. Clerk, will you file a notice of appeal.

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Certificate of Service

October 16, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Nathan Silberman